Supreme Court, U.S.
FILED

No. 05-852 DEC 29 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

GURPREET KHURANA,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MARC VAN DER HOUT
Counsel of Record
AVANTIKA SHASTRI
Attorney
VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE, LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether an immigration judge can hold that an alien filed a "frivolous asylum application" under 8 U.S.C. § 1158(d)(6) without finding that the alien *knowingly or deliberately fabricated* a material fact, as required under 8 U.S.C. § 1158(d)(6), the federal regulations, the law of four Circuit Courts of Appeals, and the Fifth Amendment of the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
THE NINTH CIRCUIT'S DECISION ON THIS IMPORTANT MATTER VIOLATES THE STATUTE, THE REGULATIONS, AND THE CONSTITUTION, *AND* CONFLICTS WITH THE CASE LAW OF ALL FOUR CIRCUIT COURTS OF APPEALS THAT HAVE CONSIDERED WHAT IS REQUIRED FOR CONCLUDING THAT A FRIVOLOUS ASYLUM APPLICATION WAS MADE	6
CONCLUSION	14
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Barreto-Claro v. U.S. Attorney-General, 275 F.3d 1334 (11th Cir. 2001) 7, 11, 12, 13

Efe v. Ashcroft, 293 F.3d 899 (5th Cir. 2002) 7, 10, 13

Farah v. Ashcroft, 348 F.3d 1153 (9th Cir. 2003) 9

Muhanna v. Gonzales, 399 F.3d 582 (3d Cir. 2004) 7, 8, 9, 10, 13

Selami v. Gonzales, 423 F.3d 621 (6th Cir. 2005) ... 7, 11, 13

CONSTITUTION

U.S. Const. amend. V 9, 10, 14

STATUTES

8 U.S.C. § 1101(f)(6) 5

8 U.S.C. § 1158(d)(6) ..... *passim*

8 U.S.C. § 1252 5

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as implemented by Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-821 (Oct. 21, 1998) 3, 5

REGULATIONS

8 C.F.R. § 208.20 ..... 2, 6, 8, 13

8 C.F.R. § 1208.20 ..... 2, 6, 8

TABLE OF AUTHORITIES

Page

MISCELLANEOUS

Austin T. Fragomen, Jr., et al., IMMIGRATION LEGISLATION HANDBOOK § 8:96 (database updated April 2004) 7

PETITION FOR WRIT OF CERTIORARI

Petitioner, Gurpreet Khurana, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in Petitioner's petition for panel rehearing and rehearing en banc is unpublished. The opinion of the Court of Appeals in Petitioner's petition for review is unpublished. The decision is reported at 134 Fed. Appx. 147 (2005). The opinions of the Board of Immigration Appeals and the Immigration Judge are also unpublished. All opinions are reprinted in the Appendix.

JURISDICTION

The Ninth Circuit Court of Appeals filed its decision on June 8, 2005. It denied a timely petition for panel rehearing and petition for rehearing en banc on September 30, 2005. This Court has jurisdiction to review the circuit court's decision on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

8 U.S.C. § 1158(d)(6) ("Frivolous [asylum] applications"):

> If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application.

8 C.F.R. §§ 208.20, 1208.20 ("Determining if an asylum application is frivolous"):

> For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War

or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner is a 35 year-old Sikh woman from India, who was raped, beaten, and threatened by the Indian police on multiple occasions for protesting human rights abuses against Sikhs. She currently resides in the United States with her husband and their two United States citizen minor children.

On April 18, 2002, Petitioner filed for asylum with the assistance of an immigration consultant. She sought asylum and withholding of removal on the basis of her religion, political opinion, and particular social group. She also asked for protection pursuant to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), as implemented by Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-821 (Oct. 21, 1998). On May 29, 2002, her case was referred to the Immigration Court and she was charged as removable from the United States.

In her application and during her hearing, Petitioner stated that she had been harassed and targeted by the Indian police for her participation in peaceful rallies that protested violence and discrimination towards Sikhs in India. Petitioner stated that she had been born and raised in New Delhi, India, as a practicing Sikh. In 1984, at the age of 14, she was raped during the anti-Sikh riots in New

Delhi following the assassination of the Indian Prime Minister by the Minister's Sikh bodyguards. As a consequence, she participated in political rallies throughout the years. After a rally in 1999, she was arrested, detained for two days, beaten, and raped by the police.

After this event, she sought to live outside of India, though she did return once in 2000 and once in 2001. The police continued to ask her family about her whereabouts in 2000 and 2001, and, during her visit in 2001, the police arrested, detained, beat, and threatened her again. Thus, after she returned to the United States, she finally filed for asylum.

Notably, during her hearing before the Immigration Judge ("IJ") and in her application, Petitioner testified that she was detained in India in 1999 from March 30 to April 2, 1999. *See e.g.*, Ninth Circuit Administrative Record ("A.R.") at 111, 113, 140; Transcript of Immigration Court Proceedings, October 7, 2002 ("Tr.") at 45, 47, 74. However, her passport showed that she did not enter India until April 2, 1999. A.R. 167; Tr. 101; *see also* Immigration Court Proceedings, Exhibit 9. When asked to explain the discrepancy, she denied lying about her arrest and said she did not remember entering on April 2, 1999. *See* A.R. 167, 170; Tr. 101, 104. The IJ and the Department of Homeland Security also questioned Petitioner regarding the date and arrangements of her marriage in 2001. A.R. 131-37, 169-70; Tr. 65-71, 103-104.

On October 7, 2004, following her individual hearing, the Immigration Judge rendered his oral decision. Specifically, the IJ found Petitioner not credible because of two alleged inconsistencies in her application: (1) Petitioner testified that she had been arrested in India on March 30, 1999 but her passport showed that she had not entered

India until April 2, 1999; and (2) that the appearance of her wedding in her photographs ostensibly conflicted with her testimony that the wedding had been planned hastily. *See* App. 14-16. The IJ concluded that "[s]ince [Petitioner's] asylum application is not credible," Petitioner had not established eligibility for asylum, withholding, and protection under CAT. App. 17, 19.

The IJ then went on to hold that "the elements of respondent's claim discussed above which lead the Court to find that her application is incredible also is a proper basis for finding that respondent's application is frivolous." App. 18. The IJ also denied her application for voluntary departure on the grounds that she was barred from establishing good moral character as one who has given false testimony for the purpose of obtaining immigration benefits under 8 U.S.C. § 1101(f)(6), INA § 101(f)(6). App. 20.

On February 16, 2004, the Board of Immigration Appeals ("BIA") adopted and affirmed the decision of the IJ. App. 6. It cited the inconsistency in the dates of her assault in 1999 and Petitioner's two return trips to India in 2000 and 2001 as supporting the IJ's findings that Petitioner was not credible. App. 6-7. It rejected Petitioner's explanation that, although she may have misremembered the date, the arrest, detention, and assault in 1999 had, in fact, occurred. *Id.*

The Ninth Circuit Court of Appeals assumed jurisdiction of this case pursuant to 8 U.S.C. § 1252. On June 8, 2005, this Court dismissed her appeal. *See* App. 2. Despite the fact that the IJ made no finding that Petitioner had deliberately fabricated facts in support of her asylum claim, the Court stated that "substantial evidence supports the

IJ's finding that Khurana filed a frivolous application containing deliberate fabrications under 8 U.S.C. § 1158(d)(6) and 8 C.F.R. § 208.20, and is thus permanently ineligible for any immigration benefit." App. 2.

On September 30, 2005, the Court denied her petition for panel rehearing and rehearing en banc. *See* App. 21.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S DECISION ON THIS IMPORTANT MATTER VIOLATES THE STATUTE, THE REGULATIONS, AND THE CONSTITUTION, *AND* CONFLICTS WITH THE CASE LAW OF ALL FOUR CIRCUIT COURTS OF APPEALS THAT HAVE CONSIDERED WHAT IS REQUIRED FOR CONCLUDING THAT A FRIVOLOUS ASYLUM APPLICATION WAS MADE.

This petition for certiorari presents a question of compelling importance regarding whether an immigration judge can find that an alien filed a "frivolous asylum application" under 8 U.S.C. § 1158(d)(6), without finding that the alien *knowingly or deliberately fabricated* a material fact. *See* 8 U.S.C. § 1158(d)(6); 8 C.F.R. §§ 208.20, 1208.20. A frivolous filing finding under 8 U.S.C. § 1158(d)(6) constitutes a permanent bar to any immigration benefits in the future.

Consistent with the statute and its regulations, the Third, Fifth, Sixth, and Eleventh Circuit Courts of Appeals have upheld frivolous asylum findings only in cases where the immigration judge specifically found that the applicant *deliberately and knowingly* misrepresented a material fact in his or her application as required by the statute and the

regulations. *Muhanna v. Gonzales*, 399 F.3d 582 (3d Cir. 2004); *Efe v. Ashcroft*, 293 F.3d 899 (5th Cir. 2002); *Selami v. Gonzales*, 423 F.3d 621 (6th Cir. 2005); *Barreto-Claro v. U.S. Attorney-General*, 275 F.3d 1334 (11th Cir. 2001). The Immigration Judge made no such finding in this case. Nevertheless, the Ninth Circuit upheld the Judge's frivolous filing finding. Its decision thereby allows an individual to be permanently barred from ever residing in the United States, and from receiving any other benefits under the Immigration Act, for purely innocent misstatements of fact. Given that the decision is in clear conflict with the statute, the regulations, and the case law of four other Circuits, this Court should review this important matter.

The Immigration and Nationality Act ("INA") prohibits the granting of any immigration benefit to an individual who has been determined to have made a frivolous asylum application. *See* 8 U.S.C. § 1158(d)(6), INA § 208(d)(6). Under 8 U.S.C. § 1158(d)(6):

> If the Attorney General determines that an alien has *knowingly* made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

See 8 U.S.C. § 1158(d)(6) (emphasis added).

As explained in the Immigration Legislation Handbook, this provision is one of the "most extreme provisions" in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Austin T. Fragomen, Jr., et al., IMMIGRATION LEGISLATION HANDBOOK § 8:96 (database updated

April 2004), cited in *Muhanna*, 399 F.3d at 588. The provision permanently bars the alien from receiving any nonimmigrant or immigrant benefit once it is triggered. *Id.* Moreover, the bar "may not be waived under any circumstances." *Id.* The bar covers any benefit under the INA, including immigrant or nonimmigrant entry. *Id.*

Given the severity of this penalty, it is a rare finding with strict procedural requirements. *See* 8 C.F.R. §§ 208.20, 1208.20. The implementing regulations at 8 C.F.R. § 208.20 set forth the criteria an IJ or the BIA must address before finding an application to be frivolous:

> An applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien *knowingly* filed a frivolous asylum application.
>
> For purposes of this section, an asylum application is frivolous if any of its material elements is *deliberately fabricated*. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

See 8 C.F.R. § 208.20 (emphasis added); *see also* 8 C.F.R. § 1208.20 (same).

Thus, prior to issuing a frivolous filing finding, the immigration judge must determine: (1) whether the asylum applicant knowingly or deliberately misrepresented a fact; (2) whether the fact was material; and (3) whether the applicant was given sufficient opportunity to explain the discrepancy or misrepresentation. *See id.*

The Ninth Circuit has never addressed the specific issue of intentional and deliberate fabrication in any published case. Its only published case on the issue of frivolous filing findings, *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003), did not address this aspect of the finding. *Id.* (finding that the immigration judge did not give the petitioner adequate opportunity to explain any discrepancies in his application).

However, four other Circuit Courts of Appeals – the Third, Fifth, Sixth, and Eleventh Circuits – have each addressed this precise issue. In *Muhanna v. Gonzales*, the Third Circuit considered the frivolous filing finding within the context of the factfinding required by due process under the Fifth Amendment. 399 F.3d at 588-89. In *Muhanna*, the immigration judge made a frivolous filing finding, based entirely on an inconsistency between the petitioner Muhanna's testimony and his original asylum application regarding a stabbing incident. *Id.* at 586. In reversing the immigration judge's finding, the Third Circuit held that: "*[T]he inconsistency in his testimony does not necessarily support a finding that the application was false.*" *Id.* at 588 (emphasis added).

The Third Circuit specifically distinguished a finding of frivolousness from an adverse credibility determination:

> *[U]nder 8 C.F.R. § 208.20 a finding of frivolousness does not flow automatically from an adverse credibility determination in any event.* Inconsistencies between testimony and an asylum application . . . do not equate to a frivolousness finding under § 1158(d)(6), which carries with it much greater consequences.

Id. at 589 (emphasis added). Rather, the Court found that it was

> because of those severe consequences that *the regulation requires more*: a finding of *deliberate fabrication* of a "material element" of an application, plus an opportunity for the alien to account for the inconsistencies.

Id. (emphasis added).

The Court concluded that "by imposing a frivolous finding based not on a thorough examination of the application but instead on her assessment of the petitioner's credibility, and by consequently refusing to allow further testimony, the IJ violated [Muhanna's Fifth Amendment rights to fact finding and argument on one's own behalf] and deprived Muhanna of due process." *Id.* Thus, the Court held that "the frivolousness finding cannot stand" and remanded the case to the BIA. *Id.*

Likewise, the Fifth, Sixth, and Eleventh Circuits have upheld frivolous filing findings in cases in which the immigration judge clearly found that the petitioner had lied, changed his or her facts, or fabricated documents so as to be eligible for asylum. In *Efe*, the Fifth Circuit Court of Appeals found that the petitioner Efe filed a frivolous application for asylum because the petitioner had "*gone back and forth with the facts and misrepresented his case several times.*" 293 F.3d at 908 (emphasis added). The immigration judge concluded that Efe had frivolously filed his asylum application after making a specific finding that "Efe had *knowingly and intentionally* made false statements on his asylum application and during his testimony with the purpose of obtaining asylum." *Id.* at 903 (emphasis added).

Similarly, the Sixth Circuit upheld a frivolous finding because the petitioner had submitted a fraudulent document. In *Selami v. Gonzales*, the petitioner submitted a fraudulent newspaper article to the immigration judge, which purportedly showed that the petitioner was a prominent anti-communist activist who was forced to flee Albania. 423 F.3d at 624. Although the petitioner contended on appeal that he did not have knowledge of the fraud, the Court found that "in light of the obvious nature of the forgery, and Selami's failure to articulate any explanation to the IJ, Selami's argument is without merit." *Id.* at 626-27. It therefore upheld the frivolous application finding. *Id.*

Finally, in *Barreto-Claro*, the Eleventh Circuit upheld a frivolous filing finding on the grounds that the petitioner had "*fabricated his answers in a knowing and deliberate manner*" about the fact that he had lived in Costa Rica for six months prior to arriving in the United States. 275 F.3d at 1339 (emphasis added). Ultimately, during his hearing, Barreto-Claro *recanted and admitted his knowledge of the falsity of his claim. Id.*; *see also id.* (stating that "rather than showing that his fabrications were neither material nor knowingly made, Barreto appears to be explaining . . . why concededly material fabrications were knowingly made") (internal citations omitted).

Notably, in *Barreto-Claro*, the Eleventh Circuit distinguished "*fraudulent*" from "frivolous" applications, and found that 8 U.S.C. § 1158(d)(6) was meant to address the former:

> Synonyms for frivolous are "carefree, fanciful, fickle, giddy, flippant, nonchalant." Roget, International Thesaurus (3d ed. 1965). The dictionary defines frivolous as "insignificant, trivial, silly or

> gay." Webster, New International Dictionary (3d ed.1961). We note perhaps that the statute is improperly captioned as "Frivolous Application." *A more appropriate caption perhaps would be "Fraudulent Application."* Here we think that the record very clearly reflects that [Petitioner] was sincere, albeit fraudulent, in his application. He was not nonchalant or flip. Neither was it insignificant or trivial to him.

Id. at 1339 n.11 (emphasis added). The Court also repeatedly emphasized that the definition of a frivolous application in the statute and the regulations involved a knowing and deliberate fabrication. *See id.* at 1338-39.

In this case, the Ninth Circuit completely failed to apply the strict standards of the statute, the regulations, and the case law of these four other Circuits when it considered the IJ's frivolous filing finding. Primarily on the basis of the discrepancy between Petitioner's testimony and her passport in regards to the date of her arrest and assault in 1999, the IJ found that Petitioner was not credible *and* had, thus, frivolously filed an asylum application in violation of 8 U.S.C. § 1158(d)(6). App. 18. However, the IJ never held that Petitioner *knowingly* made a false representation.

In fact, there is no evidence at all that Petitioner *knew* that her testimony regarding the date of her arrest and detention in 1999 was wrong. Rather, the evidence shows that Petitioner repeatedly, and in good-faith, referred to an incorrect date for her detention. In fact, her arrest and detention occurred a few days later and Petitioner had merely remembered incorrectly the exact date of her return to India and, later, her arrest. She did not change her testimony at any time, did not present any falsified

documents supporting the incorrect date and, in fact, maintained her belief in that date even when confronted with her passport. *See e.g.*, A.R. 167, 170, 177; Tr. 101, 104, 111.

Had the Court of Appeals properly applied the statute and the regulations as the Third, Fifth, Sixth, and Eleventh Circuits have done, it would have had to have found that Petitioner did not warrant a frivolous asylum filing finding. In this case, the IJ never made a finding that Petitioner deliberately and intentionally sought to deceive the Court. Petitioner testified in contradiction to her passport, but unlike the petitioners in *Barreto-Claro* and *Efe*, Petitioner has testified consistently throughout her proceedings. In contrast to the petitioner in *Barreto-Claro*, she has repeatedly affirmed the veracity of her claim and has never recanted any part of her application. Moreover, in contrast to the petitioners in *Efe*, *Barreto-Claro*, and *Selami*, Petitioner did not present or seek to present any fraudulent documentation. There is absolutely no evidence to support a finding that Petitioner knew the dates to be wrong, only that she was, *in fact*, wrong about the dates.

Rather, like in *Muhanna*, Petitioner's error was merely that - a mistake that is not indicative of any deliberate intent to deceive. Like the petitioner in *Muhanna*, her explanations for her failure to state the correct date are reasonable and plausible. Also, as in *Muhanna*, even if her explanations appear implausible, a negative credibility determination alone cannot be used as the basis for a finding that there was a frivolous asylum filing without evidence of *deliberate* fabrication.

Had the Ninth Circuit correctly applied the standards set forth in 8 U.S.C. § 1158(d)(6) and 8 C.F.R. § 208.20,

as the Third, Fifth, Sixth, and Eleventh Circuit Courts of Appeals have held apply, it could not have found that Petitioner's asylum application was frivolous. Thus, this Court must review the decision in this case to ensure that the Ninth Circuit's standard for a frivolous filing finding conforms to the standards set forth in the statute, the regulations, and the Fifth Amendment, and those of all the other Circuits that have addressed this issue.

CONCLUSION

For all of the above-stated reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MARC VAN DER HOUT
Counsel for Petitioner
AVANTIKA SHASTRI
Attorney

December 29, 2005

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

GURPREET KHURANA, Petitioner, v. ALBERTO R. GONZALES,* Attorney General, Respondent.	No. 04-71225 Agency No. A95-414-664 MEMORANDUM** (Filed Jun 08, 2005)

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted May 12, 2005***

Before: SKOPIL, BOOCHEVER, and LEAVY, Circuit Judges.

Gurpreet Khurana, a native and citizen of India, petitions for review of the decision of the Board of Immigration Appeals (BIA) affirming the denial by an immigration judge (IJ) of her requests for asylum, withholding of removal, relief under the Convention Against Torture (CAT), and the IJ's finding that Khurana filed a frivolous

* Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

*** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

asylum application. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review for substantial evidence and will uphold the BIA's determination unless the evidence compels a contrary result. *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002). We deny the petition.

Substantial evidence supports the adverse credibility finding. As one material example, there is an inconsistency between Khurana's testimony that she was arrested and raped in India in March 1999, and her passport which indicated that she was not in India at this time. If one of the identified grounds underlying a negative credibility finding is supported by substantial evidence and goes to the heart of a claim of persecution, we are bound to accept the negative credibility finding. *Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004). The record does not compel the conclusion that Khurana's testimony was credible. *See Singh v. Ashcroft*, 367 F.3d 1139, 1143-44 (9th Cir. 2004). Accordingly, Khurana failed to establish eligibility for asylum or withholding of removal. *See id.*

Substantial evidence supports the conclusion that Khurana is not entitled to relief under the CAT because she did not demonstrate that it is more likely than not that she would be tortured upon return to India if she is deported. *See* 8 C.F.R. § 208.16(c)(2); *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001).

Substantial evidence supports the IJ's finding that Khurana filed a frivolous application containing deliberate fabrications under 8 U.S.C. § 1158(d)(6) and 8 C.F.R. § 208.20, and is thus permanently ineligible for any immigration benefit. Khurana was given an adequate opportunity to explain the inconsistencies pointed out by the IJ before the IJ's frivolousness finding was made. The

BIA reviewed the record and additionally considered evidence from Khurana's neurologist regarding Khurana's claimed memory loss. Khurana had ample opportunity to explain the several inconsistencies that led to the finding of frivolousness. *See Farah v. Ashcroft*, 348 F.3d 1153, 1158 (9th Cir. 2003). The record does not compel us to reverse this finding.

PETITION FOR REVIEW DENIED.

U.S. Department of Justice
Executive Office for Immigration Review

[SEAL]

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Ganjoo, Monica N.
870 Market Street
Suite 340
San Francisco, CA 94102-0000

Office of the
District Counsel/SF
P.O. Box 26449
San Francisco, CA
94126-6449

Name: KHURANA, GURPREET A95-414-664

Date of this notice: 02/26/2004

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ F.T. Krider

Frank Krider
Acting Chief Clerk

Enclosure

Panel Members:
HOLMES, DAVID B.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A95 414 664 – San Francisco Date: FEB 26 2004

In re: GURPREET KHURANA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Monica Ganjoo, Esquire

ON BEHALF OF DHS: Peter S. Vincent
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] – Inadmissible at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] – Immigrant – no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; relief under the Convention Against Torture; voluntary departure

In a decision dated October 7, 2002, the Immigration Judge found the respondent subject to removal as charged, denied her applications for asylum, for withholding of removal, for relief under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment and for voluntary departure, and ordered her removed. The

respondent has appealed from that decision. The appeal will be dismissed.

The respondent is 33 years old and is a citizen and native of India who entered the United States in April 2001. She claims that she has been and will be persecuted in India because she is a Sikh. We find the Immigration Judge has accurately set forth the facts of the respondent's case and we adopt her statement (I.J. Dec. at 1-6). In her consideration of the respondent's claim, the Immigration Judge found that the respondent's account was not credible. The respondent challenges this determination on appeal.

Based upon our review of the record, we find that the decision of the Immigration Judge is correct and we adopt and affirm it. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). The record reflects that the shortcomings and inconsistencies cited by the Immigration Judge are present in the record; that such shortcomings and inconsistencies provide specific and cogent reasons to conclude that the respondent's claim is not credible; and that the respondent on appeal has not provided an adequate explanation for these discrepancies and shortcomings. On such record, we find that the Immigration Judge's determination is correct. *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998).

In particular, we note the Immigration Judge's finding that the respondent's passport establishes that she was actually in the United States in March and April 1999

when she claimed to have been raped by Indian authorities. We find that this inconsistency cited by the Immigration Judge is an extremely substantial discrepancy which goes to the substance of her claim and supports the Immigration Judge's adverse credibility finding. *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999). At her hearing, the respondent attempted to explain the discrepancy by asserting that she has been somewhat confused after the birth of her second child in February 2002 and on appeal she has submitted a note from her neurologist stating that she has been treated since March 2002 for postpartum depression including memory difficulty and difficulty in concentration. We do not find that such abbreviated statement is an adequate explanation for the difficulties in the respondent's case, especially in the absence of a complete explanation from the respondent concerning the inconsistencies in her claim. In this regard, we note that the respondent's passport shows that she returned to her home in India on multiple occasions after the claimed rape in March-April 1999 (Tr. at 85-87). Under the circumstances of this case, it is difficult to reconcile the respondent's return to India with her claimed fear of persecution. On the record before us, including these inconsistencies and incongruities, we are not persuaded that the Immigration Judge's adverse credibility finding was in error. The respondent has not otherwise met her burden of proof. Accordingly, the appeal will be dismissed.[1]

---

[1] On appeal the respondent has not challenged the Immigration Judge's finding that her asylum claim was frivolous and the Immigration Judge's denial of voluntary departure. In addition, the respondent has not meaningfully challenged the Immigration Judge's finding that she failed to meet her burden of demonstrating eligibility for protection under the Convention Against Torture.

ORDER: The appeal is dismissed.

/s/ David B. Holmes
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Francisco, California

File No.: A 95 414 664 October 7, 2002

In the Matter of GURPREET KHURANA Respondent	))))	IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act – alien present in the United States in violation of law, in particular overstaying her visitor's Visa.

APPLICATIONS: Asylum and withholding of removal, Torture Convention, and voluntary departure.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Alison Dixon 615 Sanson Street, 2nd Floor San Francisco, CA 94111	Monica Rahmeyer Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

Background

The respondent is a 32-year-old female native and citizen of India who was admitted to the United States as a visitor at Newark, New Jersey, on or about April 17, 2001, and authorized to remain in the United States no longer than May 16, 2001, but who has remained in the United States past that time without authorization from

the Immigration and Naturalization Service (The Service). The Service has commenced removal proceedings against the respondent, charging her with being removable pursuant to the above captioned section of the Immigration and Nationality Act (INA).

The respondent has admitted all the factual allegations contained in the Notice to Appear as amended (Exhibit 1) and conceded that she is removable as charged. Because she has declined to designate a country of removal, India has been directed by the Court pursuant to INA Section 241(B), should such action become necessary. The respondent has submitted an application for asylum under INA Section 208. This application is also considered an application for withholding of removal under both INA Section 241(b)(3) and under the Torture Convention as well. The respondent has applied for voluntary departure as well. As required by regulation, respondent has been advised of the consequences of filing a frivolous application for asylum in the United States.

The respondent's claim

The respondent has applied for asylum and withholding and Torture Convention relief on the basis of her religion, her political opinion and her membership in a particular social group. Her claim is based on events that she say [sic] go back as far as 1984 and have continued up until the time of her most recent visit to India before coming to the United States in April 2001. These incidents are primarily based on her political activities and her support of Sikh nationalism.

The respondent has visited the United States many times. The earliest visit on her asylum application shows

an entry at New York, New York on August 6, 1999, but her passport shows a number of other entries into the United States. (*See* Exhibit 9).

The respondent testified that she was born in New Delhi, India, on February 19, 1970. She testified that she has been a Sikh since birth. She testified that she has a university degree in Home Science and Fashion Design in particular.

Her last entry into the United States was on April 17, 2001, at Newark, New Jersey. She testified that she left India because she felt that life was not safe there.

The respondent's first problems according to her testimony came in 1984 in anti-Sikh riots which swept India after the killing of Prime Minister Indira Gandhi by a Sikh. The respondent testified that during this time her entire family was fleeing and that she was raped by two men in an alley. She testified that she was 14 years old at this time.

The respondent testified that she was never politically active in India. She testified, however, that on March 30, 1999, she participated in a rally organized by the Sikh Students Federation in honor of people who had suffered during the 1984 riots. She testified that 2,000 to 3,000 people were present at this rally, which she attended with a neighbor. She testified that her neighbors were arrested at this rally and that she was arrested when the police came to her house that night. She testified that there were approximately 3-4 officers and that she was taken to the local police station. She testified that the police hurt her and called her a traitor. She testified that she was beaten with a belt, kicked and hit with sticks. She testified that before she was released two days later she was raped by

one of the constables. She testified that a bribe was paid for her release, but that she did not receive medical treatment after being released. She testified that this was because her family felt that girls should not take part in such matters and that such matters – referring to the rape – should be kept secret.

The respondent testified that the police came to her house again on April 13, 1999. She testified that she was not home and that her family was directed to present her at the police station. She testified that at that point she decided to come to the United States for a short time.

The respondent testified that on April 16, 1999, she left for the United States. She testified that on arriving in this country she lived with [sic] Indian friend named Harry Aurora, to whom she is now married. The respondent testified that during the time in the United States, her Indian employer applied for an L1 Visa for her. She testified that she got pregnant and that when the company learned she would be unable to work, it withdrew the petition on or about April 25, 2000. She testified that her first child was born on July 3, 2000.

The respondent testified that on August 25, 2000 she returned to India, because she did not want to live in the United States illegally. The respondent testified that while she was in India, she went to another demonstration with a neighbor. She testified that this was another demonstration in memory of people who had died in 1984 and that this demonstration was also sponsored by the Sikh Students Federation. She testified that approximately 2,000 persons were present at this demonstration. She testified that she ran away from the demonstration as soon as she saw that people were being arrested. The respondent

testified that she was afraid of being arrested and that she knew that the police were looking for her because of her 1999 arrest. She testified that she went home for 15 to 20 days and then went back to New York because her daughter's life was in danger. The respondent testified that according to her parents, the police have come to her home twice since that time. The respondent testified that in March 2001, she returned to India for her brother's wedding. She said that the police came to know that she was there and arrested her again. She testified that she was taken to the police station on April 13, 2001, where she was again beaten. She testified that she was released when her brother bribed a police officer with 120,000 rupees. The respondent testified that when she was released they told her that if they found her again they would kill her and disfigure her so that nobody could recognize her. She testified that as a result she did not feel safe.

The respondent was married to Harry Aurora on April 25, 2001. This was 13 days after she testified that she left India in fear of her life. The application contains pictures of her wedding. On cross-examination the Government attorney asked the respondent about her wedding preparations and respondent was evasive. The Government attorney pointed out the number of people who appeared in the photographs and the respondent said that there were many people there because it was Sunday at the Sikh temple and a common meal is ordinarily served. On questioning by the Government attorney, the respondent said first that there were only a few people from her side. Then she said there was nobody from her aide. Then she said there were five or six people from her side, whom she

named as a friend that she stayed with previously, the friend's brother, the brother's wife and their two children.

Credibility

In assessing the credibility of the respondent, I have taken into account the rationality, internal consistency and inherent persuasiveness of her testimony. The Board of Immigration Appeals has stated that in reviewing IJ credibility findings it looks to the record to see if the discrepancies and omissions described by the IJ are actually present, whether they are material and whether the respondent has provided a convincing explanation. *In re A-S*, 21 I&N Dec. 1106 (BIA 1998).

In the present case the Court finds that respondent's application is not credible. This finding is based on two matters which the Court believes are fatal to the respondent's application.

The respondent testified first that she was arrested on March 30, 1999 and not released until April 2, 1999. She testified that during this time she was abused in various ways, the most serious of which was a rape. On examination by the Government, however, the fact emerges from the multiple stamps in respondent's passport that she was admitted to the United States as a visitor on March 20, 1999. (*See* Exhibit 9, pages numbered by the Court in the hearing in the lower right-hand corner of the passport page.) This in itself would not be conclusive, however, respondent's passport on the previous page shows an entry stamp into New Delhi marked 2-4-1999. That is April 2, 1999. (*See* Exhibit 4, page 22). The Court and parties agreed that Indian entry stamps are oval, while departure

stamps are rectangular. The Court therefore finds on this basis that respondent was not in India when she said she was arrested and raped.

When respondent testified that she was married 12 days after her arrival on April 13, 2001, the Court had a sense then that the wedding pictures in the respondent's application did not look like a wedding which was put together in less than two weeks. The respondent testified that 150 people attended the wedding. On examination by the Service, she insisted, however, that most of these were not guests of the bridge [sic] and groom. She testified that they were people who were at the gurdwara (or temple) on a Sunday, because a common meal was served on that day. She was evasive about whether and how the wedding had been planned, and her testimony about the number of guests invited from her family or by her was vague and disjointed. The Court has determined, however, that April 25, 2001, the day of her wedding, was not a Sunday but a Wednesday. The respondent was asked about this and she said that she had been thinking of somebody else. The Court does not find this to be a convincing explanation.

The Court notes that respondent was also given an opportunity to explain the fact that her passport entries do not support her claim of being detained from March 30, 1999 to April 2, 1999. Despite given that opportunity, the respondent continued to insist that she had been telling the truth about her detention. The Court does not find this explanation convincing, either.

The Court finds that the events surrounding the March 30, 1999 arrest are material because this is the most single serious element of her claim for asylum. The Court finds that the wedding timing is also material

because it means that if she intended to stay in India and fled only in fear of her life, a wedding on the scale depicted in her photographs is very unlikely to have been put together in such a short time. That leads the Court to the conclusion that the wedding had been planned some time in advance and respondent had previously planned to leave India when she did. The Court's finding that respondent's testimony about the March 30, 1999 arrest not being credible lends weight to this interpretation of the timing of her wedding. Because of the seriousness of both of these matters, the Court finds that respondent's application for asylum is not credible in its entirety.

Asylum and withholding of removal

An applicant for asylum or withholding of removal bears the evidentiary burdens of proof and persuasion. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) *modified*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); 8 C.F.R. 208.14, 242.17(C).

An application for asylum must meet the statutory definition of a "refugee", which is defined as an individual who is unwilling or unable to return to his country of nationality (or of having none, the country in which he last habitually resided) because of past persecution or because he has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group or political opinion. INA Section 101(a)(42)(A).

To establish that his fear is well-founded, the respondent must show that it is both subjectively genuine and objectively reasonable through credible, direct and specific

evidence which demonstrates that he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort, the persecutor is aware or could become aware that he possesses this belief or characteristic, the persecutor has the capability of punishing him, and the persecutor has the inclination to punish him. *Mogharrabi, supra.*

An applicant for withholding of removal must demonstrate a clear probability of persecution on account of one or more of the statutorily enumerated grounds. *INS v. Stevic*, 467 U.S. 407 (1984). The Court in *Stevic* held that the "clear probability" standard requires a showing that it is more likely than not that he would be subject to persecution.

The Supreme Court has held that the terms "well-founded fear" and "clear probability" are significantly different and that the burden of proof required to establish eligibility for asylum is lower than that required for withholding of removal. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

In the present case, the Court has found that respondent's application is not credible. The Court therefore cannot find the respondent has established either past persecution or a well-founded fear of future persecution. It follows from the foregoing that if the respondent has not met the lower standard required for asylum she cannot meet the higher standard required for withholding under the Act. The Court therefore cannot find that respondent has established that it is more likely than not that she will be persecuted on the one [sic] of the statutory grounds if she is returned to India.

Pursuant to Section 208(d)(4) of the Act, a person who knowingly files a frivolous application for asylum in the United States is barred forever from receiving any benefits under the Immigration or Nationality Act. A frivolous application is defined as one which contains statements or responses that are deliberately fabricated. By regulation, a finding that an application is frivolous is to be made only if the Immigration Judge is satisfied that the applicant during the course of the proceedings has had sufficient opportunity to account for any discrepancies or implausible aspects of her claim. 8 C.F.R. Section 208.20.

In the present case, the Court finds that the elements of respondent's claim discussed above which lead the Court to find that her application is incredible also is a proper basis for finding that respondent's application is frivolous. The Court finds that in the event a reviewing court should find that the wedding timing question is not a proper one for the frivolous finding, the Court finds that the passport and March 30, 1999 discrepancies are sufficient by themselves.

The Court therefore finds that for the foregoing reasons respondent has been given adequate opportunity to explain, have [sic] not done so convincingly, and her application is deemed to be frivolous.

CAT

Aliens in exclusion, deportation or removal proceedings on or after March 22, 1999 may apply for withholding of removal under the United Nations Convention Against Torture and other forms of cruel, inhuman or degrading treatment or punishment (Convention Against Torture).

See 8 C.F.R. Section 208.18(b)(1). *See* also 8 C.F.R. Sections 208.16 and 208.17.

The application for withholding of removal under the Convention Against Torture bears the burden of proving that it was "more likely than not" that she would be tortured if removed to the proposed country of removal." 8 C.F.R. Section 208.16(c)(2). As with asylum, this burden can be established by testimony without corroboration if the testimony is credible. *See id.*; *see also Matter of Y-B,* Interim Dec. 3337 (BIA 1998). In the present case, the Court has found the respondent's application is not credible. The Court therefore finds that respondent has not made the necessary showings for withholding under the Convention Against Torture. The Court therefore finds that respondent is in eligible [sic] for withholding of removable [sic] under the Convention Against Torture because she has not proven "more likely than not" that she will be tortured if forced to return to India.

Voluntary departure

The respondent has also applied for voluntary departure under INA section 240B(b)(1) which requires that she show that she has been physically present in the United States for at least one year immediately preceding the date that she was served with her NTA, that she has been a person of good moral character for at least five years immediately preceding the application that she is not deportable under INA Section 237(a)(2)(iii) or 237(a)(4) and that she has established by clear and convincing evidence that she has the means and intent to depart the United States.

The Court finds that respondent is barred from establishing good moral character as one who has given false testimony for the purpose of obtaining any benefits under this Act. INA Section 101(f)(6). The Court finds that respondent was put under oath today to tell the truth and that she has not done so. The Court finds that respondent has insisted that she has been telling the truth in the face of compelling evidence to the contrary. The Court finds therefore the respondent is not eligible for voluntary departure.

For the foregoing reasons and after considering all evidence of record in this case, the following orders will be entered:

ORDER

IT IS ORDERED THAT the respondent's applications for asylum, withholding of removal pursuant to Section 241(b)(3) of the Act and withholding of removal under the Torture Convention be and hereby are now DENIED.

IT IS FURTHER ORDERED THAT respondent's application for voluntary departure is and hereby is now DENIED.

IT IS FURTHER ORDERED THAT respondent be removed and deported to India on the charge as contained in the Notice to Appear.

/s/ Robert Yeargin
ROBERT YEARGIN
U.S. Immigration Judge

A95414664 October 7, 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GURPREET KHURANA, Petitioner, v. ALBERTO R. GONZALES, Attorney General, Respondent.	No. 04-71225 Agency No. A95-414-664 ORDER (Filed Sep. 30, 2005)

Before: SKOPIL, BOOCHEVER, and LEAVY, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing and recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

(3)

Supreme Court, U.S.
FILED
APR 7 - 2006
OFFICE OF THE CLERK

No. 05-852

In the Supreme Court of the United States

GURPREET KHURANA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly sustained the immigration judge's finding that petitioner's asylum application was frivolous based on determinations that petitioner fabricated her testimony and that the fabrication was material to her claim.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Barreto-Claro v. *United States Attorney General*, 275 F.3d 1334 (11th Cir. 2001) 8, 9
Efe v. *Ashcroft*, 293 F.3d 899 (5tl. Cir. 2002) 8, 9
Muhanna v. *Gonzales*, 399 F.3d 582 (3d Cir. 2005) 9
Selami v. *Gonzales*, 423 F.3d 621 (6th Cir. 2005) 8, 9

Statutes and regulation:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1158(d)(6) 2, 5, 6
8 U.S.C. 1252(d)(1) 7
6 U.S.C. 251 (Supp. II 2002) 3
8 C.F.R. 1208.20 ..... 2, 6

In the Supreme Court of the United States

No. 05-852

GURPREET KHURANA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but is *reprinted in* 134 F. App'x 147. The decisions of the Board of Immigration Appeals (Pet. App. 5-8) and the immigration judge (Pet. App. 9-20) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 8, 2005. A petition for rehearing was denied on September 30, 2005 (Pet. App. 21). The petition for a writ of certiorari was filed on December 29, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act provides that, "[i]f the Attorney General determines that an alien

has knowingly made a frivolous application for asylum * * *, the alien shall be permanently ineligible for any benefits under" the Act's provisions. 8 U.S.C. 1158(d)(6).[1] By regulation, the Attorney General has determined that an application will be deemed "frivolous," within the meaning of Section 1158(d)(6), if the immigration judge or the Board of Immigration Appeals (Board) "specifically finds that the alien knowingly filed a frivolous asylum application." 8 C.F.R. 1208.20. An asylum application is "frivolous" if "any of its material elements is deliberately fabricated." *Ibid.* The regulation further provides that a finding of frivolousness shall be made only if, in the view of the immigration judge or the Board, the alien has had a "sufficient opportunity to account for any discrepancies or implausible aspects of the claim." *Ibid.*

2. Petitioner is a native and citizen of India who has made numerous entries into the United States. Pet. App. 10-11. According to petitioner, "she was never politically active in India." *Id.* at 11. She claimed, however, that after participating in a Sikh rally on March 30, 1999, she was arrested by Indian police and detained until April 2, 1999. Petitioner alleged that, during her detention, she was physically abused and raped. *Id.* at 11-12. Petitioner further alleged that the police visited her house on April 13, 1999, and three days later she left for the United States. She testified that, after arriving in the United States, she lived with a friend to whom she was later married. *Id.* at 12.

Petitioner returned to India in August 2000 and again in March 2001. Pet. App. 12-13. She testified that

---

[1] A finding of frivolousness does not preclude the alien from seeking withholding of removal, however. 8 C.F.R. 1208.20.

she was arrested and beaten on April 13, 2001, following another Sikh rally. *Id.* at 13. Four days later, petitioner arrived in the United States on a visitor's visa. Petitioner testified that she was married eight days later at an elaborate wedding ceremony. She submitted photographs of her wedding to the immigration judge. *Ibid.*

3. When petitioner overstayed her visa, the Immigration and Naturalization Service commenced removal proceedings against her.[2] Petitioner applied for asylum and withholding of removal, claiming persecution on account of her religion, political opinion, and membership in a particular social group. Pet. App. 9-10. The immigration judge denied relief on the ground that petitioner's asylum application was not credible and was frivolous. *Id.* at 9-20.

In evaluating petitioner's claim, the immigration judge expressly took into account "the rationality, internal consistency and inherent persuasiveness of her testimony," the materiality of any discrepancies and inconsistencies, and petitioner's explanations for problems with her evidence. Pet. App. 14. The immigration judge identified two problems with petitioner's testimony that he considered to be "fatal" to her case. *Ibid.*

First, petitioner's claim that she was detained and abused by Indian police from March 30 to April 2, 1999, was irreconcilable with the evidence from her passport, which had "multiple stamps" demonstrating that she was in the United States from March 20, 1999, until April 2, 1999. Pet. App. 14-15. The immigration judge further noted that petitioner's passport showed that she

---

[2] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

had voluntarily returned to India on April 2, 1999, at the very time she claimed to be fleeing that country based on persecution. *Ibid.* When given the opportunity to explain the discrepancy, petitioner insisted that her testimony was accurate. *Id.* at 15. The immigration judge "d[id] not find th[at] explanation convincing" in light of the undisputed contents of the passport. *Ibid.* The immigration judge further found that this flaw in the evidence was "material" because "this is the most single serious element of her claim for asylum." *Ibid.*

Second, the immigration judge found that petitioner's testimony that she returned to the United States on April 13, 2001, "in fear of her life" was not credible because of the elaborate wedding ceremony that took place within days of her return. Pet. App. 13. The immigration judge reasoned that "a wedding on the scale depicted in [petitioner's] photographs," *id.* at 16—with 150 people in attendance, *id.* at 15—"is very unlikely to have been put together in such a short time," and in the wake of fleeing for one's life, *id.* at 16.

The immigration judge further noted that petitioner's responses to questioning about the wedding arrangements were "evasive," "vague and disjointed." Pet. App. 15. She insisted that the 150 guests were not guests, but were individuals who happened to be at the temple on Sunday because a common meal was served. *Ibid.* When petitioner was informed that her wedding date fell on a Wednesday, rather than a Sunday, the only explanation that she offered was that "she had been thinking of somebody else." *Ibid.* The immigration judge found that explanation unconvincing, and concluded that the evidence demonstrated that "the wedding had been planned some time in advance and [petitioner] had previously planned to leave India when she

did" because of her impending wedding, rather than because of any fear of persecution. *Id.* at 16. Because the flaw in petitioner's testimony went to the basis for her departure from India, the immigration judge found the inconsistency to be material and "serious[]." *Id.* at 15, 16.

The immigration judge accordingly denied petitioner relief on the ground that her application was not credible. Pet. App. 16-17. The immigration judge also separately ruled that her application was "frivolous," under 8 U.S.C. 1158(d)(6). In so holding, the immigration judge emphasized that a frivolousness determination must be based upon a finding that petitioner "knowingly" filed and pursued an application that "contains statements or responses that are deliberately fabricated." Pet. App. 18. The immigration judge then found that those requirements were satisfied by the same evidence that established petitioner's application to be non-credible, citing both the timing of the re-entry and wedding as well as the conflict in timing between the claimed persecution and petitioner's presence in the United States. *Ibid.*; see *id.* at 20 (petitioner "has given false testimony for the purpose of obtaining * * * benefits under this Act"). Finally, the immigration judge noted that, although petitioner was given the opportunity to explain the problems in her testimony, she "[had] not done so convincingly." *Id.* at 18.

4. Petitioner appealed to the Board, but challenged only the immigration judge's credibility determination. Petitioner did not appeal the immigration judge's finding that her application was frivolous. Pet. App. 6, 7 n.1, The Board affirmed, *id.* at 5-8, holding that

> [t]he record reflects that the shortcomings and inconsistencies cited by the Immigration Judge are present in the record; that such shortcomings and inconsistencies provide specific and cogent reasons to conclude that the respondent's claim is not credible; and that the respondent on appeal has not provided an adequate explanation for these discrepancies and shortcomings.

Id. at 6. In particular, the Board noted that petitioner's claim that she was detained and abused by Indian police at a time when she was already in the United States "is an extremely substantial discrepancy which goes to the substance of her claim." *Id.* at 7. The Board also found it "difficult to reconcile the respondent's return to India with her claimed fear of persecution." *Ibid.*

5. The court of appeals unanimously affirmed in an unpublished decision. Pet. App. 1-3. The court did not address the government's argument that petitioner's challenge to the frivolousness ruling had been waived by her failure to appeal that determination to the Board. Gov't C.A. Br. 20-22. The court did conclude, however, that substantial evidence in the record supported the immigration judge's finding that petitioner had filed a "frivolous application" that "contain[ed] deliberate fabrications," within the meaning of 8 U.S.C. 1158(d)(6) and 8 C.F.R. 1208.20. Pet. App. 2. The court also held that the immigration judge had afforded petitioner "ample opportunity to explain the several inconsistencies that led to the finding of frivolousness," but that petitioner had not satisfactorily done so. *Id.* at 3.

ARGUMENT

Petitioner argues (Pet. 6-14) that this Court should grant review to address whether a determination of frivolousness under 8 U.S.C. 1158(d)(6) can be made in the absence of findings that the alien "knowingly or deliberately fabricated a material fact," Pet. 6 (emphasis omitted). That claim does not warrant review for three reasons.

First, there is a procedural barrier to this Court's review of the question presented. Petitioner did not appeal the immigration judge's frivolousness determination to the Board or, more particularly, argue to the Board that the immigration judge had failed to make the findings required by the statute and regulation. See Pet. App. 7 n.1. That failure to exhaust the administrative remedies available to review the immigration judge's frivolousness determination bars the court of appeals and, in turn, this Court from considering the question presented. The Immigration and Nationality Act permits judicial review of a final order of removal "only if," *inter alia*, "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)1. Even apart from that statutory bar, petitioner's waiver of the claim would provide an independent basis for sustaining the court of appeals' judgment, and would pretermit resolution of the question presented.

Second, the record in this case does not present the question petitioner raises. Petitioner seeks this Court's review (Pet. 6) of whether a finding of frivolousness can be made "without finding that the alien *knowingly or deliberately fabricated* a material fact." In this case, the court of appeals did not eschew such findings; it af-

firmed because substantial evidence supported the "[immigration judge]'s finding that [petitioner] filed a frivolous application *containing deliberate fabrications*." Pet. App. 2 (emphasis added). The immigration judge, in turn, specifically noted that he was required to find, *inter alia*, that petitioner's application contained "deliberately fabricated" information, and he concluded that the record provided a "proper basis for finding" that legal standard to be met. *Id.* at 18; see *id.* at 20 (petitioner "has given false testimony for the purpose of obtaining * * * benefits under this Act").

Petitioner's insistence (Pet. 7) that this case concerns "purely innocent misstatements of fact" overlooks that petitioner never attempted to explain to the immigration judge that her repeatedly reaffirmed testimony that she was detained and abused by Indian guards during the same period in time that her passport places her in the United States (see Pet. App. 15) was actually a "purely innocent misstatement[] of fact," nor does she explain what "purely innocent misstatements of fact" underlay the attendance of 150 people at her elaborate wedding just days after she alleges she abruptly and unexpectedly fled India in fear for her life. In any event, the court of appeals' decision neither holds nor suggests that a frivolousness determination can be made based on innocent misstatements of fact or, more particularly, without a finding that the alien knowingly or deliberately fabricated material information.

Third, there is no conflict in the circuits. Petitioner notes (Pet. 6-11) that a number of circuits have sustained findings by immigration judges and the Board that asylum applications were frivolous. See *Selami* v. *Gonzales*, 423 F.3d 621 (6th Cir. 2005); *Efe* v. *Ashcroft*, 293 F.3d 899 (5th Cir. 2002); *Barreto-Claro* v. *United*

States Attorney General, 275 F.3d 1334 (11th Cir. 2001). The court of appeals in this case applied the same legal standard as those courts and its decision is in full accord with their rulings. See *Selami*, 423 F.3d at 624 (upholding finding of frivolousness based on the alien's submission of a fraudulent newspaper article intended to corroborate his testimony); *Efe*, 293 F.3d at 908 (frivolousness determination upheld based on the alien's having "gone back and forth with the facts and misrepresented his case several times," while failing to clarify his contradictory testimony); *Barreto-Claro*, 275 F.3d at 1339 (frivolousness determination based on a false statement in the alien's application, which he compounded with false testimony about how he came to the United States).

Petitioner's reliance (Pet. 6-7) on *Muhanna* v. *Gonzales*, 399 F.3d 582 (3d Cir. 2005), is misplaced. In that case, the Third Circuit reversed an immigration judge's determination of frivolousness that rested entirely on an inconsistency between the alien's testimony and asylum application. *Id.* at 586. The court stressed that a finding of frivolousness required more than a finding that the testimony was not credible, and required a full hearing on the applicant's underlying asylum claim. *Id.* at 588. The Third Circuit reversed because the immigration judge's truncation of the hearing following a preliminary determination that the alien was not credible precluded an assessment of whether the inconsistency was a "material element" of the asylum application. *Ibid.* The Third Circuit further found that the alien's explanation for the inconsistent testimony was plausible. *Ibid.* Here, by contrast, the court of appeals upheld the immigration judge's distinct finding, separate from his credibility ruling and after a full hearing, that the numerous

inconsistencies in petitioner's testimony were both deliberately fabricated and material. Pet. App. 2, 17-18, 20.

In the end, petitioner's argument for this Court's review rests not upon any new or different legal standard applied by the court of appeals, but upon petitioner's disagreement with that court's application of the law to the facts of her case. That record-bound question does not merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

APRIL 2006

(2)

No. 05-852

FILED
APR 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

GURPREET KHURANA,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

MARC VAN DER HOUT
Counsel of Record
AVANTIKA SHASTRI
Attorney
VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE, LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Brief for Petitioner 1

Conclusion 8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alexandrov v. Gonzales, ___ F.3d. ___, 2006 U.S. App. LEXIS 8055 (6th Cir. April 4, 2006) 7

Barreto-Claro v. U.S. Attorney-General, 275 F.3d 1334 (11th Cir. 2001) 6

Efe v. Ashcroft, 293 F.3d 899 (5th Cir. 2002) 7

Fongwo v. Gonzales, 430 F.3d 944 (8th Cir. 2005) 6

Ignatova v. Gonzales, 430 F.3d 1209 (8th Cir. 2005) 6

Muhanna v. Gonzales, 399 F.3d 582 (3d Cir. 2004) 5, 7

Selami v. Gonzales, 423 F.3d 621 (6th Cir. 2005) 6

Sterkaj v. Gonzales, 439 F.3d 273 (6th Cir. 2006) 6

AGENCY DECISIONS

Matter of A-S-, 21 I. & N. Dec. 1106 (BIA 1998) 5

Matter of S-A-, 22 I. & N. Dec. 1328 (BIA 2000) 4

STATUTES

8 U.S.C. § 1158(d)(6) 1, 3, 6, 7

8 U.S.C. § 1252(d)(1) 2

REGULATIONS

8 C.F.R. § 208.20 ..... 3, 6

8 C.F.R. § 1208.20 ..... 3, 6

REPLY BRIEF FOR PETITIONER

This Court should grant this petition for writ of certiorari to clearly establish the legal standards required for a finding that a noncitizen filed a "frivolous asylum application" pursuant to 8 U.S.C. § 1158(d)(6).

Contrary to Respondent's allegations, the Court clearly has jurisdiction over this petition. In addition, this petition presents compelling reasons warranting this Court's review, including raising an important question of federal law where there is an intra-Circuit conflict that has not yet been settled by this Court.

1. Respondent erroneously contends that this Court does not have jurisdiction over this petition because Petitioner failed to exhaust her administrative remedies. Brief in Opposition ("Br. in Opp.") 7. Respondent also erroneously contends that the Ninth Circuit Court of Appeals ("Ninth Circuit") improperly considered the "frivolous finding." *Id.*

As an initial matter, in support for this contention, Respondent relies on the Board of Immigration Appeals' ("Board") statement in footnote 1 of its decision to assert that Petitioner never exhausted her administrative remedies in appealing to the Board the immigration judge's conclusion that she filed a frivolous asylum application. App. 7 n.1. It is Respondent's assertion that the issue was waived before the Board, and therefore Respondent asserts that this Court is deprived of authority to review the matter. However, in its decision, the Ninth Circuit clearly considered the immigration judge's finding that Petitioner filed a frivolous asylum application, App. 2-3. The Ninth Circuit *only* had the authority to consider such

an issue if it had been properly before the Court. *See* 8 U.S.C. § 1252(d)(1). Because the Immigration and Nationality Act requires the exhaustion of all administrative remedies, the Ninth Circuit simply would not have addressed the issue if it had not been properly raised below. *Id.*

Respondent appears to assert that the Ninth Circuit erred in considering the immigration judge's finding that Petitioner filed a frivolous asylum application. Simply put, however, this Court must review the decision of the Ninth Circuit and not the decision of the Board. The Ninth Circuit clearly found that administrative remedies had been exhausted.

If, as Respondent alleges, the Ninth Circuit improperly reached the issue in the first place, then that error itself warrants this Court's review.

In addition, also contrary to Respondent's contentions, the Ninth Circuit correctly found that Petitioner exhausted her administrative remedies. The record shows that she challenged the frivolous asylum filing finding at every stage of her proceedings below. In her appeal before the Board, Petitioner asserted that "[the immigration judge] was wrong to state that she had filed a frivolous asylum application." Ninth Circuit Administrative Record ("A.R.") 31; *see also* A.R. 45 (contesting, in her notice of appeal to the Board, that the immigration judge "said that [she] had lied on her application."). Therefore, she fully exhausted her administrative remedies and this Court has jurisdiction over this petition.

2. Respondent also fails to understand the critical issue in this case, which is not a factual matter but a legal matter. Respondent contends that the Ninth Circuit's

decision contained a finding of deliberate fabrication because the Ninth Circuit stated that it found substantial evidence supporting the immigration judge's "frivolous finding." Br. in Opp. 7-8. The fact that the Ninth Circuit recited that it found deliberate fabrication is not enough to support a "frivolous finding" under 8 U.S.C. § 1158(d)(6). What Petitioner contests in this petition is whether the evidence was sufficient *as a matter of law* to show deliberate fabrication. Without sufficient evidence of intentional fabrication, the Court effectively made a "frivolous finding" without a showing of that required element under 8 U.S.C. § 1158(d)(6).

Under the regulations for 8 U.S.C. § 1158(d)(6), the judge must make a specific finding that a material element of an asylum application was "*deliberately* fabricated" before he or she can find that the asylum application is frivolous. *See* 8 C.F.R. §§ 208.20, 1208.20; *see also* 8 U.S.C. § 1158(d)(6) (requiring that the Attorney General determine whether "the alien has *knowingly* made a frivolous application for asylum").

The Ninth Circuit's decision never specifically identifies the evidence that it considered to be the basis for "deliberate fabrication.". Nothing in the Ninth Circuit decision demonstrates what evidence it considered in concluding that Petitioner intentionally or deliberately made misstatements to the Court. The Ninth Circuit affirmed the immigration judge's decision on the ground that Petitioner had adequate opportunity to explain the several alleged inconsistencies in the record that supported the immigration judge's finding that the asylum application was frivolous. App. 2. Yet the immigration judge's "frivolous finding" itself was based on only an

adverse credibility finding and nothing more. *See* App. 18 ("In the present case, the [Immigration] Court finds that the elements of respondent's claim discussed above which lead the Court to find that her application is incredible also is a proper basis for finding that respondent's application is frivolous."). A finding that the applicant is not credible is insufficient to meet the requirements of 8 U.S.C. § 1158(d)(6). There must also be a finding the applicant knowingly or deliberately fabricated material information in the application. The Ninth Circuit reached the first step, but never the second.

There was no evidence in the record that Petitioner knowingly or deliberately fabricated her asylum application, as opposed to just not being credible, that would support the immigration judge's decision or the Ninth Circuit's affirmance of that decision. As Petitioner demonstrated in her petition for writ of certiorari, the evidence suggests she made an innocent misstatement. *See* Petition for Writ of Certiorari ("Pet.") 12-13. She has also repeatedly sought to explain these inconsistencies to the immigration judge, the Board, and the Ninth Circuit during her hearing and in her briefs on appeal. *See e.g.*, App. 7, 15.

Even assuming *arguendo* that Petitioner failed to adequately explain the alleged inconsistencies, her failure in this regard is insufficient to constitute evidence of *deliberate fabrication*. The legal standard for adverse credibility findings already requires that the immigration judge give the applicant an adequate opportunity to explain any alleged inconsistencies before the judge may make an adverse credibility finding. In *Matter of S-A-*, 22 I. & N. Dec. 1328, 1331 (BIA 2000), the Board stated that

adverse credibility decisions would only be upheld where a review of the record reveals that (1) the discrepancies and omissions described by the immigration judge are actually present in the record; (2) such discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) the alien has failed to provide a convincing explanation for the discrepancies and omissions. *See also Matter of A-S-*, 21 I. & N. Dec. 1106, 1109 (BIA 1998).

The crucial difference between an adverse credibility finding and a "frivolous finding" is the additional showing of intent ("knowing" or "deliberate" fabrication) required for a "frivolous finding." Without pointing to additional evidence of an intent to deceive, the same evidence cannot be used to support the separate and additional element of deliberate fabrication for a "frivolous finding"; rather, a "frivolous finding" requires *more*. *See Muhanna v. Gonzales*, 399 F.3d 582, 588 (3d Cir. 2004) (reversing the immigration judge's "frivolous finding" not simply because of procedural irregularities during the hearing, but also because the inconsistencies in the petitioner's testimony did "not necessarily support a finding that the application was false, but rather tend[ed] only to show that [the petitioner] was not credible at one point during the hearing.").

To allow the Ninth Circuit to uphold the "frivolous finding" on this evidentiary record would improperly equate the two findings – adverse credibility and the "frivolous filing" of an asylum application – without requiring a higher burden of evidentiary proof to support the immensely harsh consequences of the latter finding.

See 8 U.S.C. § 1158(d)(6) (stating that an applicant for asylum who has filed a frivolous asylum application shall be permanently ineligible for any benefits under the Immigration and Nationality Act).

Thus, this Court must review this important federal question to determine whether the evidence in the record was *legally* sufficient to support a "frivolous finding" under 8 U.S.C. § 1158(d)(6) and 8 C.F.R. §§ 208.20, 1208.20.

3. Respondent also erroneously portrays this case as one that does not involve intra-Circuit conflict. Br. in Opp. 8-10. According to Respondent, the other Courts of Appeals have applied the same legal standard that was applied in the Ninth Circuit in this case. This analysis is incorrect given that the legal and evidentiary standards applied to find fabrication in the Third, Fifth, Sixth, Eighth, and Eleventh Circuits have been distinctively different than the standard applied in the Ninth Circuit for this case.

This case does not contain any of the evidence of *deliberate* or *intentional* fabrication that was present in those cases, such as: a recantation by the petitioner (*Barreto-Claro v. U.S. Attorney-General*, 275 F.3d 1334, 1338-39 (11th Cir. 2001), described at Pet. 11), the submission of fraudulent documents (*Selami v. Gonzales*, 423 F.3d 621, 626-27 (6th Cir. 2005), described at Pet. 11; *Fongwo v. Gonzales*, 430 F.3d 944, 947 (8th Cir. 2005) (upholding "frivolous finding" where petitioner had submitted fraudulent documents); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (finding that the petitioner had submitted fraudulent documents); *Sterkaj v. Gonzales*, 439 F.3d 273, 278-79 (6th Cir. 2006) (finding that the petitioner submitted a fabricated summons and "wanted" document)), or

contradictory testimony across different hearings (*Efe v. Ashcroft*, 293 F.3d 899, 908 (5th Cir. 2002), described at Pet. 10). *Cf. Alexandrov v. Gonzales*, ___ F.3d. ___, 2006 U.S. App. LEXIS 8055 (6th Cir. April 4, 2006) (vacated "frivolous finding" because submitted documents had not been shown to be fraudulent).

Instead, as in *Muhanna*, *supra*, this case contains only an adverse credibility finding without any evidence of *deliberate fabrication*. *See* Pet. 9-10. In *Muhanna*, the Third Circuit was clear that there are specific "factual findings mandated by [§ 1158(d)(6)'s] implementing regulation." 399 F.3d at 588. The Court was also clear that, "it is because of [the] severe consequences that the regulation requires more: a finding of deliberate fabrication of a 'material element' of an application, plus an opportunity for the alien to account for inconsistencies." *Id.* In contrast to five other Circuits, the Ninth Circuit has not required more evidence as a legal matter and has essentially conflated the credibility determination with the "frivolous finding" determination.

Thus, this Court should review this petition so as to resolve this intra-Circuit conflict, and to establish a clear and uniform legal standard that the Courts of Appeals must apply before making such a significant finding.

CONCLUSION

For the foregoing reasons, and for those in the petition, this petition for writ of certiorari should be granted.

Respectfully submitted,

MARC VAN DER HOUT
Counsel of Record
AVANTIKA SHASTRI
Attorney

April 17, 2006

REPLY BRIEF